In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1659

EDWARD BRITT WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on one count of possession of whiskey on which the tax had not been paid, in violation of 26 U.S.C. 5205(a)(2) and 5604(a)(1). He was sentenced to three years' imprisonment and fined $5000. The court of appeals affirmed without opinion (Pet. App. A1-A2).

1. The evidence at the hearing on the motion to suppress showed that, based on information from other

officers, federal agents of the Alcohol, Tobacco and Firearms Division, Atlanta, Georgia, had commenced surveillance of a parking lot suspected of being a transfer point for illegal whiskey. (App. 13-14).[1] Such transfers were effected by driving a loaded car to the parking lot, where it was left; within a short time, a man would arrive and drive the loaded car away. Later the car would be returned empty and left for the original driver. (App. 16-17). An agent had previously observed what appeared to be the latter part of such a transfer involving the car here in question—*i.e.*, the unloaded car being driven from the lot (App. 10). A check of the license number revealed that the license tag belonged to a different vehicle (App. 10-11).

On September 11, 1969, about 7:00 p.m., two federal agents observed the same car being driven into the parking lot by petitioner's co-defendant, followed by petitioner in another car. The first car appeared to be heavily loaded and the windows were covered by hanging clothing. After parking the cars, the two men entered a nearby tavern; they then returned to the second car and drove off, leaving the loaded car unattended (App. 9-11).

The two agents approached the car that was left behind and observed that it had heavy-duty springs and shock absorbers. After smelling an odor of "moonshine" whiskey coming from the trunk, the agents pried open the trunk lid and observed numerous plastic jugs. They then searched the rest of the

[1] "App." refers to the appendix in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

car and found a large number of plastic jugs of non-tax-paid whiskey (App. 11-12). They alerted other officers by radio, and petitioner and his companion were arrested (App. 12).

2. Petitioner concedes that the agents had probable cause to believe that the unattended automobile contained illicit distilled spirits. (Pet. 4-5). His sole contention is that the search of the car without a warrant was unreasonable under the circumstances.

The trial court correctly held, however, that this case is controlled by this Court's decision in *Chambers* v. *Maroney*, 399 U.S. 42. Although the car here was locked and unoccupied, it was in no sense immobilized. Petitioner and the driver were in the area with the keys to the car, capable of returning and driving it away. Moreover, in view of the normal practice for effecting transfers of illegal whiskey, it could reasonably be assumed that at least one other person might appear at any moment to drive the car away. Since the agents could not know when the car might be removed from the parking lot, it was not improper for them to conduct an immediate search rather than delaying the search until they could obtain a warrant.

Nor would it have been reasonably practicable under these circumstances for one of the two agents to leave the scene at 7:30 p.m. in order to locate a magistrate and obtain a search warrant. The choice of immediate search, or of seizure to prevent the car's removal, would still have confronted the remaining agent. See *Husty* v. *United States*, 282 U.S. 694. Consequently, the decision by the agents here was

entirely proper and did not offend petitioner's Fourth Amendment rights.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1971.

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